we feel that such a holding is violative of any provisions of the State or the United States Constitutions.

The fact that, as stated above, the courts of the several states are in almost hopeless confusion can in nowise affect our decision, and it is to be observed that two of our adjoining states (Texas on the east and Arizona on the west) have arrived at seemingly diametrically opposed results.

We have held that the abutting landowner has no vested right in the flow of public travel. In essence, although differently phrased, the defendants' contention is that the damage to the remaining property is caused by this loss of access to the public stream of travel. As mentioned heretofore, one of the principal differences in the decisions on this subject relates to whether compensation may be allowed for diversion of traffic or whether diversion of traffic is a compensable item of damage in considering before-and-after values. Our decision in Slaughter squarely denies compensation for diversion of traffic, and it is partly upon this same theory that the cases cited in Footnote 2 were determined. Contrariwise, the cases cited in Footnote 3, particularly those from California, Arizona and Minnesota, permit compensation for diversion of traffic, in one way or another. In this case, to allow compensation would require an overruling of Slaughter, and this we decline to do. There is no justification under our decisions to distinguish between diverting traffic by moving a right-of-way or by building a fence. We declined to permit compensation for the diversion of traffic caused by moving a right-of-way in Slaughter, and reason

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FOOTNOTE 7

Board of County Comm'rs v. Slaughter, 1945, 49 N.M. 141, 158 P. 2d 859. See, also

Tomblin v. Town of Las Cruces, 1934, 38 N.M. 247, 31 P. 2d 258, 91 A.L.R. 185.

Mandell v. Board of County Comm'rs of Bernalillo County, 1946, 44 N.M. 109, 99 P. 2d 408.

and logic require a similar result here where the diversion is by reason of the fence.

We take the position that abutters (the defendants in this case) have a right of access to the public roads system; but, it does not necessarily follow that they have a right of direct access to the main-traveled portions thereof. Circuity of travel, as long as it is not unreasonable, and any supposed loss in land value by reason of the diversion of express traffic, are non-compensable.

In other words, the right of access, if it is to be termed a right, as such, is merely a right to reasonable, but not unlimited, access to and from the land.

Thus, for clarity, we would define the right of access as applicable to the state of New Mexico, as a right of ingress to and egress from land on an abutting street or highway and therefrom to the system of public roads, subject to reasonable traffic regulations and not affected by diversion of traffic or reasonable circuity of travel.

Defendants and amici curiae urge that paragraph 17 of the stipulation, quoted by us, requires granting judgment in the amount sought. We do not so view the stipulation, inasmuch as, in context, it followed the propositions of law upon which the parties were relying and was expressly dependent upon the court's determination of the legal issue. It was merely an agreement fixing a value if, but only if, the damage was found to be compensable. Any other construction would do violence to the real agreement of the parties and be contrary to the established rule as to the effect to be given to stipulations of the parties.

FOOTNOTE 8:

Aldredge v. Aldredge, 1945, 20 N.M. 47, 151 P. 311;
In re Quantius' Will, 1954, 58 N.M. 30, [illegible] P.2d 306;
Griego v. Hogan, 1965, 71 N.M. 250, 377 P.2d 953.

We would also observe in this connection that, although the trial court concluded that the frontage road operated in partial mitigation, nevertheless no consideration was given in the judgment to the question of mitigation of damages. In any event, we have here determined that the defendants' loss of access is non-compensable. Therefore, the agreement of counsel as to the difference in value is of no importance.

The judgment of the district court will be reversed, insofar as it awards the defendants compensation for loss of access.

IT IS SO ORDERED.

s David W. Carmody
Justice

WE CONCUR:

s J. C. Compton, C.J.
s David Chavez, Jr., J.
s M. E. Noble, J.

MOISE, J., dissenting.

MOISE, Justice (dissenting).

As pointed out by the majority, the problem here under consideration finds the courts in hopeless conflict. As I view the matter, the majority have failed to properly appraise these cases and accordingly have come to an erroneous conclusion.

The general problem is one with which courts have been wrestling with increasing frequency since the advent of the Federal Interstate and Defense Highway System in 1956, adopted by the Congress for the express purpose of accelerating or speeding up the construction of the Federal-aid highway system, 23 U. S. C. A., § 101. This results from the fact that whereas limiting of access to heavily traveled roads was not unknown, the standards adopted for the Interstate System of highways built under the accelerated program require acquisition of access rights of lands abutting thereon. *By Ch. 234, N. M. S. L. 1957 (§§ 55-10-1 to 55-10-10, N. M. S. A. 1953) our legislature provided for construction of controlled-access roads and for the acquisition of rights of access, air, view and light, § 55-10-5, N. M. S. A. 1953.*

As late as the end of 1961, in an article entitled, "Frontage Roads: To Compensate or Not to Compensate" appearing in 56 Northwestern University Law Review, at page 587, it is stated that only ten courts had passed on the general question of whether compensation should be paid to the owner of property left abutting on a frontage road, and that the decisions from these ten states fall into three categories: (1) the loss resulting from being placed on a frontage road should be compensated in eminent domain with the fact of the frontage road being considered in mitigation of the loss suffered; (2) the result reached in (1) is correct only if there is also a compensable taking of land; (3) no compensation should be paid whether land is taken or not.

The cases cited as coming to conclusion (1) that compensation must be paid whether land is taken or not are People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799; Franks v. State Highway Commission, 182 Kan. 131, 319 P. 2d 535, and McMoran v. State, 55 Wash. 2d 37, 345 P. 2d 598. Cited as supporting rule (2) which limits compensation to situations where there has been a taking of land as well as placing the property on a frontage road are State v. Thelberg, 87 Ariz. 318, 350 P. 2d 988; State Highway Commission v. Finch, 237 Miss. 314, 114 So. 2d 673. Holding that no compensation is due under rule (3) are State Highway Commission v. Bingham, 231 Ark. 934, 333 S. W. 2d 728; Selig v. State, 10 N. Y. 2d 34, 217 N. Y. S. 2d 33, 176 N. E. 2d 59; Darnall v. State (S. D. 1961) 108 N. W. 2d 201; State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 126 N. E. 2d 53; Nick v. State Highway Comm., 13 Wis. 2d 511, 109 N. W. 2d 71. The majority opinion recognizes this same classification of the decisions, and cites the same cases in support. In addition, I would call attention to the following cases involving the same general questions, some of which are cited in the footnotes to the opinion: Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117; Florida State Turnpike Authority v. Anhoco Corporation (Fla. 1959) 116 So. 2d 8; Iowa State Highway Comm. v. Smith, 248 Iowa 869, 82 N. W. 2d 755; 73 A. L. R. 2d 680; In re Appropriation of Easements for Highway Purposes, 93 Ohio App. 179, 112 N. E. 2d 411 (Note State ex rel. Merritt v. Linzell, supra, cited in support of rule (3); Department of Public Works and Buildings v. Anastopolo, 14 Ill. 2d 216, 151 N. E. 2d 337.

As is apparent from a reading of the cases cited, supra, there is no basis for any kind of a reconciliation between them. I note the comment made in the year 1906 that:

> "The right of an owner of land abutting on public highways has been a fruitful source of litigation in the

courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy." Sauer v. City of New York, 206 U. S. 536, 548, 27 S. Ct. 686.

That the passage of more than fifty years since the quoted language was used has not altered the situation is evident. See, also, 3 Stanford Law Review 298.

The only authority in previous decisions of this court cited by the majority is the case of Board of County Commissioners v. Slaughter, 49 N. M. 141, 158 P. 2d 859. They say that to allow compensation under the facts of this case would require that Slaughter be overruled. With this statement I disagree and I will undertake to demonstrate its fallacy.

In Slaughter, the following was said by the court:

"It seems to be the universal holding that where the taking of one's property is not involved and a highway is relocated and leaves a property owner completely off the new highway, but still with means of entrance and exit, that he has no right to damages for this reason alone."

It is true that a literal reading of this language used by the court, if entitled to general application, would deny appellees any recovery in the instant case. However, the Slaughter case did not involve interference or changing of access in any sense. A new road was built on a new location, leaving the property owner's improvements with the identical access to the road as it previously existed unchanged in the slightest. Accordingly, it is plain to see that the

language used, insofar as appellant would apply it to the instant fact situation, was dicta at best. While in no sense desiring to in any way detract from the holding in Slaughter under the facts of that case, I am not impressed that the language quoted is controlling here.

Neither does the recognition that compensation is to be paid for loss of value to property because of taking or interference with access mean that damages are being paid for circuity of travel or for loss because of diversion of the stream of traffic. Rather, it simply amounts to payment for the difference in the market value of the property before and after taking, or damaging access for public use. I do not see how anything different can be considered as compliance with the requirements of Art. II, Sec. 20, N. M. Const.

While I might agree that as suggested by the majority, there is no more right to damages resulting from diverting traffic by moving a right of way than by building a fence, I submit that the analogy as stated begs the question. As already pointed out, in Slaughter no change whatever was made in the access available to or from the property. There was no interference with access and no damage resulting directly or indirectly from this cause. Here, however, access is being interfered with. Because part of the loss of value results from inaccessibility is no reason to deny that there is compensable loss of value resulting from the interference with access. As suggested by my dissent in State v. Silva, 71 N. M. 350, 378 P. 2d 595, loss of business resulting from diverting traffic could be eliminated as an element of damages by a proper instruction to the jury. To compare the facts here present with those ruled on in Slaughter is to be totally unrealistic and illogical.

Notice is also taken of Tomlin v. Town of Las Cruces, 38 N. M. 247, 31 P. 2d 258, wherein a property owner was denied

relief in equity to enjoin removal of signs placed by a public body directing traffic on a public street so as to by-pass petitioner's property. This holding was mentioned in the later case of Bennett v. Nations, 49 N. M. 389, 164 P. 2d 1019, upholding a permanent injunction preventing a private individual from obstructing a public road thereby requiring an abutter thereon, in passing to and from his property, to travel more than a mile further over a circuitous and inconvenient route and then across a private land. In this latter case the court took note of the right of a property owner damaged by an obstruction materially interfering with or substantially impairing his right of access, at least if it depreciates the property, even if the obstruction is some distance from the property and does not completely cut off ingress and egress. Also, in this case, a special right of access from property to a street was recognized in the following language quoted with approval from Young v. Rothrock, 121 Iowa 588, 96 N. W. 1105, 1108:

> "... If, then, plaintiff has shown that the street which was obstructed led directly to his premises, and that the obstruction interfered with his access thereto, this is a sufficient showing of special damages to authorize him to maintain the suit. There is no difficulty with the rule, although its application is not always easy. Plaintiff has shown that, if deprived of the use of First Street, he is compelled to go several blocks out of his way to reach the premises owned by him, which abut on the street, and are in the same block as defendants' ice house, and that First street gives him the only reasonable access to his property. This is a sufficient basis for his action."

In our most recent pronouncement in Board of County Comm'rs of Lincoln County v. Harris, 69 N. M. 315, 366 P. 2d 710, we held that an owner of property abutting on a paved highway was entitled to damages when his property

was depreciated in value by a material change in grade of the highway, resulting in a situation where ingress and egress to the property was thereby made difficult or inconvenient. Implicit in this holding is a determination that the owner of land abutting on a street or highway has a property interest over the street to and from his property or, as sometimes said, a right of ingress and egress to and from the property. This right has been described as being in the nature of an easement in the abutting street. Bacich v. Board of Control of California, 23 Cal. 2d 343, 144 P. 2d 818; Rose v. State, 19 Cal. 2d 713, 123 P. 2d 505, quoted on another point in Harris, supra, at 319; Lewis, Eminent Domain (3rd Ed.) 177, § 120; 2 Nichols, Eminent Domain (3rd Ed.) § 6.444. This is necessarily true since the right to recover in the case turned on whether property had been taken or damaged.

The majority dispose of Harris with the casual remark that it related "to a change of grade as it affected access and is not in point under the facts of this case." They do not undertake to explain why one rule is applicable when access is affected by a change of grade, and another rule comes into play when access is affected by some other means, as for example erecting a steel wire fence between a road and property which was formerly freely accessible thereto. I submit there is no difference in the results so far as the value of the owner's property is concerned, and there is no logical reason for a different rule.

Similarly, the majority suggest one rule if access is completely cut off, as was true in New Mexico Railroad Co. v. Hendricks, 6 N. M. 611, 30 N. M. 901, and another where it is only partially cut off. Again, I submit that the difference is in degree only and not in principles involved, and the distinction attempted is not reasonable. They overlook that Art. II, Sec. 20, N. M. Const., provides that "private prop-

erty shall not be taken *or damaged* for public use without just compensation." Damaging requires just compensation just as surely as a total taking.

The attempted distinction of Bennett v. Nations, 49 N. M. 389, 164 P. 2d 1019, is wholly unrealistic. My reasoning in this regard is set out at length in my dissent in State v. Silva, supra. I do not repeat what I there said in the interest of brevity.

I also find myself in disagreement with the interpretation placed by the majority in what they described as the Access Condemnation Statute (§§ 55-10-1 to 55-10-10, N. M. S. A. 1953). If it were not intended to be mandatory why was it passed at all? If it is to be applied only where property is totally deprived of access why was language to this effect not used? Certainly, some test is necessary to determine when the act applies. The majority suggest none, while conceding a right to compensation for partial deprivation of access in certain cases. I submit that the passage of this legislation amounts to a legislative determination that property owners are entitled to compensation for the reduction in value of property resulting from either a taking or a substantial interference with access. See Smith v. State Highway Commission, 185 Kan. 445, 447, 346 P. 2d 259. Compare State v. City of Albuquerque, 67 N. M. 383, 355 P. 2d 925.

As already noted, the cases in the various jurisdictions, while being distinguishable one from another because of slight differences in fact situations present, cannot be truly reconciled. The question presented is one of principle. *On one side we find a citizen's investment in property duly protected from the sovereign by the provision of the constitution requiring that his "property shall not be taken or damaged for public use without just compensation."* Art. II, § 20, N. M. Const. On the other hand, we are faced with an

argument of appellant which is best stated in the following, quoted from 56 Northwestern University Law Review 587, 598:

> "The decline in the market value of the property results from the loss of the potential to exploit commercially the express traffic lanes and the diversion of the express traffic away from the pavement adjoining his land. What he has lost is the value of 'frontage' on a heavily trafficked road. This is the same sort of loss that is generally encompassed within the doctrine of circuity of travel. Moreover, what he is losing, in fact, is the benefit — entirely unearned by him — to his land of the commercially exploitable proximity of heavy traffic. Since he has no right to this benefit and has done nothing to create it, he should have little cause to complain at losing it."

This argument is followed by pointing out that the state may do one of two things, either of which would be less desirable from the property owner's standpoint: (1) condemn the abutter's entire right of access and build no frontage road, or (2) build the free way or non-access road on an entirely new alignment. It is suggested that the first alternative will be adopted when money can be saved through paying for access rather than spending for construction of a service road and at the same time having to pay for interference with access. It is noted that the second alternative would be even more unsatisfactory to the property owner because he would then be entitled to no damages while being hurt just as badly if not worse. The author of the note then suggests that the issue is one of whether "the abutter's loss should be borne by him or by the community-at-large" and that in arriving at a decision on the issue the courts should recognize the issues noted above and should "not simply rely on pat statements of what constitutes an eminent domain or a police power action, or on an unquestioning

acceptance of cases decided under different factual conditions."

I propose to follow this suggestion and I start by undertaking an analysis of the language quoted above. First, I would express disagreement with the statement that what the property owner is "losing, in fact, is the benefit — entirely unearned by him — to his land of the commercially exploitable proximity of heavy traffic." It seems to me that what he is losing is an investment made in the confidence that it would be protected by government and not seized without payment by the state as might be expected under a dictatorship. *Protection of his property ownership is what our American and New Mexico constitutions guarantee him.* Also, I think benefits resulting from wise investment of capital should not be considered as unearned any more than are the fruits of a man's labor. The strength of this nation has resulted from its espousal of the free enterprise system. The right to profit from investment is implicit. "Frontage" is a term which has a precise meaning in the business community, and is a commodity which is bought and sold every day. I would repeat that in making the investment the property owner has done something to entitle him to consideration and has earned a right to the fruits thereof and to continue without undue interference in the legitimate quest of a profit. He does have cause to complain if he loses his investment through seizure or usurpation without compensation.

It is appropriate at this point to quote the language of that eminent economist, Henry Hazlett, in a paper delivered to the New Jersey Bar Association in 1951, entitled "Capitalism and Our Economic Goals."

> ". . . The outstanding merit of the free enterprise system is precisely that it is free. It is a system of free

voluntary economic relations among individuals. It is the precise opposite of the coercive socialistic system. Under such a system, man is not only stimulated to give his greatest exertions to produce the maximum income and volume of goods for himself and his family, but his energies are released in all directions. Nothing awakens the spirit of man, nothing liberates his spiritual forces, like freedom.

"For make no mistake about it: economic freedom is an inseparable part of freedom. You cannot have spiritual freedom with economic slavery. When men are economic serfs of the state, they have no real freedom of thought, freedom of speech, or freedom of religion. When they depend economically on the rulers of the state, they must curry favor with those rulers, even if this means, as in Russia, the most abject and loathesome servility."

Likewise, I am not impressed that the property owner should be concerned with the alternatives suggested whereby he would end up a bigger loser. I do not doubt that when appellant determines that it is more proper or economical to condemn all access or to lay out its roads on an entirely new right-of-way, it will do so. However, I cannot believe that a responsible public body such as the appellant would enter on a program of this sort without considering the loss and waste that would result from by-passing existing improvements. In this connection, it is interesting to observe that in 56 Northwestern University Law Review 587, 600, it is pointed out that the courts of only five states out of ten that have considered the problem have held that compensation had to be paid for interference with access. At the same time, note is taken of the policy of 22 states, or 51% of those responding to a questionnaire circulated by the writer of the article, which paid for access when property formerly abutting on a highway was placed on a service road.

In my view, the conclusion reached in the article and ad-

vanced by the majority that if property is left with access to and from a service road, damages suffered should not be compensable, is highly questionable.

The problem, as I see it, is to determine if the situation presented in the instant case more nearly approximates that considered in Slaughter, supra, or in Harris, supra. In Slaughter, access to and from the old road was in no way altered or interfered with. In Harris, access was made more difficult or inconvetiient through change of grade. Here, it was through limitation of means of getting to and from the traveled highway. I conclude that the rule in Harris is the more appropriate, and that compensation should be paid if access is made materially more difficult or inconvenient.

The majority state that appellees have a right of access to the public road system, but not necessarily to the express portions thereof. Also, that any loss in land value resulting from reasonable circuity of travel which may be imposed is not compensable.

The question which they do not answer is by what method do they determine that an abutting landowner who has been deprived of direct access to the express portion of a highway, previously enjoyed by him, has or has not suffered compensable damages?

Also, how does the court determine that the circuity of travel resulting from any change in the access is reasonable or not?

To my way of thinking, the answer to both of these questions must be resolved by having the fact-finder determine as a question of fact if the access to the property has been made materially more difficult or inconvenient as we held in Board of County Comm'rs of Lincoln County v. Harris, supra. If it is determined that it has been, then the property

owner is entitled to be paid the damages resulting therefrom. As noted by the majority, the parties stipulated that if damages are payable for interference with access, the property damages amount to $44,120.00.

In the light of the determination by the majority that compensation would be payable if the interference with access results in unreasonable circuity of travel, I do not understand how they can conclude as a matter of law, as they apparently do here, that the appellees are not entitled to recover the stipulated amount of damage. I would affiirm the judgment appealed from. I dissent from the contrary conclusion.

s Irwin S. Moise
Justice

Article 2, Section 20 of the New Mexico State Constitution reads:

> "Private property shall not be taken or damaged for public use without just compensation."

The Fifth Amendment to the Constitution of the United States reads in part as follows:

> "* * * nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use *without just compensation.*"

The Fourteenth Amendment to the Constitution reads in part as follows:

> "* * * nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within that jurisdiction *the equal protection of the laws.*"

Section 55-10-5, N. M. S. A. 1953 Compilation, Volume 8, Part 2 provides the method for acquisition of access rights either by purchase condemnation. This section reads as follows:

> "*Acquisition of property and property rights.* For the purposes of this act (55-10-1 to 55-10-10), the state highway commission, alone, or in agreement with any county, city, town or village may acquire private or public property and property rights for controlled access facilities and service roads, including rights of access, air, view, and light, by purchase or condemnation in the same manner as such units are now, or hereafter may be authorized by law to acquire such property or property rights in connection with highways and streets within their respective jurisdictions. All property rights acquired under the provisions of this act shall be in fee simple, except in circumstances where

fee simple cannot be obtained an appropriate easement in perpetuity shall be acceptable. *In connection with the acquisition of property or property rights for any controlled-access facility or portion thereof, or service road in connection therewith, the state highway commission, alone, or in agreement with any county, city, town or village highway authority may, in its discretion, acquire an entire lot, block, or tract of land if by so doing the interests of the public will be best served even though said entire lot, block, or tract is not immediately needed for the right of way proper.*" (Emphasis ours).

Section 107, 23 U. S. C. A., page 15 reads in part as follows:

"*Acquisition of rights-of-way - - - - - Interstate System*

(a) In any case in which the Secretary is requested by a State to acquire land or interests in lands (*including within the term 'interests in lands', the control of access thereto from adjoining lands*) required by such State for right-of-way or other purposes in connection with the prosecution of any project for the construction, reconstruction, or improvement of any section of the Interstate System, the Secretary is authorized, in the name of the United States and prior to the approval of title by the Attorney General, to acquire, enter upon, and take possession of such lands or interests in lands by purchase, donation, condemnation, or otherwise in accordance with the laws of the United States. * * * * * " (Emphasis ours)